

Dated: May 23, 1995.

J.W. Lockwood,

*Rear Admiral, U.S. Coast Guard, Commander,
13th Coast Guard District.*

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POSTAL SERVICE

39 CFR Part 265

Compliance With Subpoenas, Summonses, and Court Orders by Postal Employees Within the Inspection Service Where the Postal Service or the United States Is Not a Party

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: The Postal Service proposes to establish procedures for Postal Service employees within the Postal Inspection Service to respond to subpoenas, summonses, and court orders to produce records or give testimony in cases where the Postal Service is not a party. The purpose of this proposed rule is to minimize disruption of normal Postal Inspection Service functions caused by compliance with those demands, maintain control over release of public information, prevent the disclosure of information that should not legally be disclosed, prevent the Postal Service from being misused for private purposes, and otherwise protect the interests of the United States. These procedures would prohibit postal employees within or assigned to the Postal Inspection Service from complying with subpoenas, summonses, and other court orders in cases where the Postal Service is not a party unless authorized by certain authorizing officials.

DATES: Comments must be submitted on or before July 6, 1995. Comments will be available for public inspection until July 21, 1995.

ADDRESSES: Written comments should be mailed or delivered to James M. Parrott, Associate Counsel, Postal Inspection Service, United States Postal Service, 475 L'Enfant Plaza SW, Room 3411, Washington, DC 20260-2181.

Comments may be delivered to room 3411 at the above address between 8:15 a.m. and 4:45 p.m., Monday through Friday. Copies of all written comments will be available for inspection and photocopying during these hours in room 3411.

FOR FURTHER INFORMATION CONTACT: James M. Parrott, Associate Counsel, Office of the Chief Postal Inspector, (202) 268-4417.

SUPPLEMENTARY INFORMATION: The proposed rule provides that postal employees within or assigned to the Postal Inspection Service must follow certain rules for the release of information in the form of documents or testimony. Giving testimony or releasing a document in legal proceedings where the Postal Service or the United States is not a party must be authorized beforehand. Employees within or assigned to the Inspection Service may comply with subpoenas, summonses, and court orders where the Postal Service or the United States is not a party, with the authorization of specified authorizing officials after consulting Inspection Service legal counsel. The release of the information must be in compliance with applicable laws and regulations and not be against the interests of the United States.

Several federal agencies have enacted regulations that give them the authority to control the release of documents and testimony in legal proceedings where the agency is not a party. Courts have recognized that federal agencies may limit compliance in these situations. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Additionally, subpoenas, summonses, and orders issued by state courts, legislatures, or legislative committees that attempt to assert jurisdiction over federal agencies are inconsistent with the Supremacy Clause of the U.S. Constitution. A federal regulation regarding compliance with those subpoenas reinforces this principle. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967).

This proposed rule does not apply to situations in which the United States, the Postal Service, or any federal agency is a party in action; Congressional requests, summonses, or subpoenas; consultative services and technical assistance rendered by the Inspection Service in the course of its normal functions; employees serving as expert witnesses; employees making appearances in their private capacity; and when it has been determined by an authorizing official that it is in the public interest.

Proposed new § 265.13 of title 39 of the Code of Federal Regulations will be the Postal Service regulation concerning the compliance with subpoenas, summonses, and court orders by postal employees within the Inspection Service where the Postal Service or the United States is not a party. This section has also been written to reflect the changes in organization that the Inspection Service has undergone. As an example, the position of Regional Chief

Inspector no longer exists within the Inspection Service. Current regulations identify that official as responsible for authorizing testimony or the production of documents pursuant to a subpoena, summons, or court order where the Postal Service, the United States, or another federal agency is not a party. Now, the authorizing official, in most cases, is the Postal Inspector in Charge of the affected field Division.

List of Subjects in 39 CFR Part 265

Administrative practice and procedure, Government employees, Release of information.

Accordingly, 39 CFR part 265 is proposed to be amended as set forth below.

PART 265—RELEASE OF INFORMATION

1. The authority citation for part 265 continues to read as follows:

Authority: 39 U.S.C. 401; 5 U.S.C. 552; Inspector General Act of 1978, as amended (Pub. L. 95-452, as amended), 5 U.S.C. App. 3.

2. The heading of § 265.11 is revised to read as follows:

§ 265.11 Compliance with subpoena duces tecum, court orders, and summonses.

3. Paragraphs (b) and (c) of § 265.11 are removed and paragraph (b) is reserved. A new § 265.13 is added to read as follows:

§ 265.13 Compliance with subpoenas, summonses, and court orders by postal employees within the Inspection Service where the Postal Service, the United States, or any other federal agency is not a party.

(a) *Applicability of this section.* These rules apply to all federal, state, and local court proceedings, as well as administrative and legislative proceedings, other than:

- (1) Proceedings where the United States, the Postal Service, or any other federal agency is a party;
- (2) Congressional requests or subpoenas for testimony or documents;
- (3) Consultative services and technical assistance rendered by the Inspection Service in executing its normal functions;

(4) Employees serving as expert witnesses in connection with professional and consultative services under § 447.23 of this chapter and under title 5, Code of Federal Regulations, part 7001, provided that employees acting in this capacity must state for the record that their testimony reflects their personal opinions and should not be viewed as the official position of the Postal Service;

(5) Employees making appearances in their private capacities in proceedings that do not relate to the Postal Service (e.g., cases arising from traffic accidents, domestic relations) and do not involve professional or consultative services; and

(6) When in the opinion of the Counsel or the Counsel's designee, Office of the Chief Postal Inspector, it has been determined that it is in the best interest of the Inspection Service or in the public interest.

(b) *Purpose and scope.* These provisions limit the participation of postal employees within or assigned to the Inspection Service, in private litigation, and other proceedings in which the Postal Service, the United States, or any other federal agency is not a party. The rules are intended to promote the careful supervision of Inspection Service resources and to reduce the risk of inappropriate disclosures that might affect postal operations.

(c) *Definitions.* For the purposes of this section:

(1) *Authorizing official* is the person responsible for giving the authorization for release of documents or permission to testify.

(2) *Case or matter* means any civil proceeding before a court of law, administrative board, hearing officer, or other body conducting a judicial or administrative proceeding in which the United States, the Postal Service, or another federal agency is not a named party.

(3) *Demand* includes any request, order, or subpoena for testimony or the production of documents.

(4) *Document* means all records, papers, or official files, including, but not limited to, official letters, telegrams, memoranda, reports, studies, calendar and diary entries, graphs, notes, charts, tabulations, data analyses, statistical or information accumulations, records of meetings and conversations, film impressions, magnetic tapes, computer discs, and sound or mechanical reproductions;

(5) *Employee or Inspection Service employee*, for the purpose of this regulation only, refers to a Postal Service employee currently or formerly assigned to the Postal Inspection Service, student interns, contractors and employees of contractors who have access to Inspection Service information and records.

(6) *Inspection Service* means the organizational unit within the Postal Service as outlined in § 224.3 of this chapter.

(7) *Inspection Service Legal Counsel* is an attorney authorized by the Chief

Postal Inspector to give legal advice to members of the Inspection Service.

(8) *Inspection Service Manual* is the directive containing the standard operating procedures for Postal Inspectors and certain Inspection Service employees.

(9) *Nonpublic* includes any material or information not subject to mandatory public disclosure under § 265.6(b).

(10) *Official case file* means official documents that relate to a particular case or investigation. These documents may be kept at any location and do not necessarily have to be in the same location in order to constitute the file.

(11) *Postal Inspector reports* include all written reports, letters, recordings, or other memorializations made in conjunction with the duties of a Postal Inspector.

(12) *Testify or testimony* includes both in-person oral statements before any body conducting a judicial or administrative proceeding and statements made in depositions, answers to interrogatories, declarations, affidavits, or other similar documents.

(13) *Third-party action* means an action, judicial or administrative, in which the United States, the Postal Service, or any other federal agency is not a named party.

(d) *Policy.* No current or former employee within the Inspection Service may testify or produce documents concerning information acquired in the course of employment or as a result of his or her relationship with the Postal Service in any proceeding to which this subsection applies (see paragraph (a) of this section), unless authorized to do so. Authorization will be provided by:

(1) The Postal Inspector in Charge of the affected field Division, or designee, for Division personnel and records, after that official has determined through consultation with Inspection Service legal counsel that no legal objection, privilege, or exemption applies to such testimony or production of documents.

(2) The Chief Postal Inspector or designee for Headquarters employees and records, after that official has determined through consultation with Inspection Service legal counsel, that no legal objection, privilege, or exemption applies to such testimony or production of documents.

(3) Consideration shall be given to:

(i) Statutory restrictions, as well as any legal objection, exemption, or privilege that may apply;

(ii) Relevant legal standards for disclosure of nonpublic information and documents;

(iii) Inspection Service rules and regulations and the public interest;

(iv) Conservation of employee time; and

(v) Prevention of the expenditure of Postal Service resources for private purposes.

(4) If additional information is necessary before a determination can be made, the authorizing official may, in coordination with Inspection Service legal counsel, request assistance from the Department of Justice.

(e) *Compliance with subpoena duces tecum.* (1) Except as required by part 262 of this chapter, produce any other record of the Postal Service only in compliance with a subpoena *duces tecum* or appropriate court order.

(2) Do not release any record containing information relating to an employee's security or loyalty.

(3) Honor subpoenas and court orders only when disclosure is authorized.

(4) When authorized to comply with a subpoena *duces tecum* or court order, do not leave the originals with the court.

(5) Postal Inspector reports are considered to be confidential internal documents and shall not be released unless there is specific authorization by the Chief Postal Inspector or the Inspector in Charge of the affected field Division, after consulting with Inspection Service legal counsel.

(6) The Inspection Service Manual and other operating instructions issued to Inspection Service employees are considered to be confidential and shall not be released unless there is specific authorization, after consultation with Inspection Service legal counsel. If the requested information relates to confidential investigative techniques, or release of the information would adversely affect the law enforcement mission of the Inspection Service, the subpoenaed official, through Inspection Service legal counsel, may request an *in camera, ex parte* conference to determine the necessity for the release of the information. The entire Manual should not be given to any party.

(7) Notes, memoranda, reports, transcriptions, whether written or recorded and made pursuant to an official investigation conducted by a member of the Inspection Service, are the property of the Inspection Service and are part of the official case file, whether stored with the official file.

(f) *Compliance with summonses and subpoenas ad testificandum.* (1) If an Inspection Service employee is served with a third-party summons or a subpoena requiring an appearance in court, contact should be made with Inspection Service legal counsel to determine whether and which exemptions or restrictions apply to proposed testimony. Inspection Service

employees are directed to comply with summonses, subpoenas, and court orders, as to appearance, but may not testify without authorization.

(2) Postal Inspector reports or records will not be presented during testimony, in either state or federal courts in which the United States, the Postal Service, or another federal agency is not a party in interest, unless authorized by the Chief Postal Inspector or the Postal Inspector in Charge of the affected field Division, who will make the decision after consulting with Inspection Service legal counsel. If an attempt is made to compel production, through testimony, the employee is directed to decline to produce the information or matter and to state that it may be exempted and may not be disclosed or produced without the specific approval of the Chief Postal Inspector or the Postal Inspector in Charge of the affected field Division. The Postal Service will offer all possible assistance to the courts, but the question of disclosing information for which an exemption may be claimed is a matter of discretion that rests with the appropriate official. Paragraph (e) of this section covers the release of Inspection Service documents in cases where the Postal Service or the United States is not a party.

(g) *General procedures for obtaining Inspection Service documents and testimony from Inspection Service employees.* (1) To facilitate the orderly response to demands for the testimony of Inspection Service employees and production of documents in cases where the United States, the Postal Service, or another federal agency is not a party, all demands for the production of nonpublic documents or testimony of Inspection Service employees concerning matters relating to their official duties and not subject to the exemptions set forth in paragraph (a) of this section shall be in writing and conform to the requirements outlined in paragraphs (g)(2) and (g)(3) of this section.

(2) Before or simultaneously with service of a demand described in paragraph (g)(1) of this section, the requesting party shall serve on the Counsel, Office of the Chief Postal Inspector, 475 L'Enfant Plaza SW, Washington, DC 20260-2181, an affidavit or declaration containing the following information:

- (i) The title of the case and the forum where it will be heard;
- (ii) The party's interest in the case;
- (iii) The reasons for the demand;
- (iv) A showing that the requested information is available, by law, to a party outside the Postal Service;

(v) If testimony is sought, a summary of the anticipated testimony;

(vi) If testimony is sought, a showing that Inspection Service records could not be provided and used in place of the requested testimony;

(vii) The intended use of the documents or testimony; and

(viii) An affirmative statement that the documents or testimony is necessary for defending or prosecuting the case at issue.

(3) The Counsel, Office of the Chief Postal Inspector, shall act as agent for the receipt of legal process for demands for production of records or testimony of Inspection Service employees where the United States, the Postal Service, or any other federal agency is not a party. A subpoena for testimony or for the production of documents from an Inspection Service employee concerning official matters shall be served in accordance with the applicable rules of civil procedure. A copy of the subpoena and affidavit or declaration, if not previously furnished, shall also be sent to the Chief Postal Inspector or the appropriate Postal Inspector in Charge.

(4) Any Inspection Service employee who is served with a demand shall promptly inform the Chief Postal Inspector, or the appropriate Postal Inspector in Charge, of the nature of the documents or testimony sought and all relevant facts and circumstances.

(h) *Authorization of testimony or production of documents.* (1) The Chief Postal Inspector or the Postal Inspector in Charge of the affected field Division, after consulting with Inspection Service legal counsel, shall determine whether testimony or the production of documents will be authorized.

(2) Before authorizing the requested testimony or the production of documents, the Chief Postal Inspector or the Postal Inspector in Charge of the affected field Division shall consider the following factors:

- (i) Statutory restrictions, as well as any legal objection, exemption, or privilege that may apply;
- (ii) Relevant legal standards for disclosure of nonpublic information and documents;
- (iii) Inspection Service rules and regulations and the public interest;
- (iv) Conservation of employee time; and
- (v) Prevention of expenditures of government time and resources solely for private purposes.

(3) If, in the opinion of the authorizing official, the documents should not be released or testimony should not be furnished, that official's decision is final.

(4) Inspection Service legal counsel may consult or negotiate with the party or the party's counsel seeking testimony or documents to refine and limit the demand, so that compliance is less burdensome, or obtain information necessary to make the determination whether the documents or testimony will be authorized. If the party or party's counsel seeking the documents or testimony fails to cooperate in good faith, preventing Inspection Service legal counsel from making an informed recommendation to the authorizing official, that failure may be presented to the court or other body conducting the proceeding as a basis for objection.

(5) Permission to testify or to release documents in all cases will be limited to matters outlined in the affidavit or declaration described in paragraph (g)(2) of this section or to such parts as deemed appropriate by the authorizing official.

(6) If the authorizing official allows the release of documents or testimony to be given by an employee, arrangements shall be made for the taking of testimony or receipt of documents by the least disruptive methods to the employee's official duties. Testimony may, for example, be provided by affidavits, answers to interrogatories, written depositions, or depositions transcribed, recorded, or preserved by any other means allowable by law.

(i) While giving a deposition, the employee may, at the option of the authorizing official, be represented by Inspection Service legal counsel.

(ii) While completing affidavits, or other written reports or at any time during the process of preparing for testimony or releasing documents, the employee may seek the assistance of Inspection Service legal counsel.

(7) Absent written authorization from the authorizing official, the employee shall respectfully decline to produce the requested documents, testify, or, otherwise, disclose the requested information.

(8) If the authorization is denied or not received by the return date, the employee, together with counsel, where appropriate, shall appear at the stated time and place, produce a copy of this section, and respectfully decline to testify or produce any document on the basis of these regulations.

(9) The employee shall appear as ordered by the subpoena, summons, or other appropriate court order, unless:

(i) Legal counsel has advised the employee that an appearance is inappropriate, as in cases where the subpoena, summons, or other court order was not properly issued or served,

has been withdrawn, discovery has been stayed; or

(ii) Where the Postal Service will present a legal objection to furnishing the requested information or testimony.

(i) *Inspection Service employees as expert or opinion witnesses.* No Inspection Service employee may testify as an expert or opinion witness, with regard to any matter arising out of the employee's duties or functions at the Postal Service, for any party other than the United States, except that in extraordinary circumstances, the Counsel, Office of the Chief Postal Inspector, may approve such testimony in private litigation. An Inspection Service employee may not testify as such an expert or opinion witness without the express authorization of the Counsel, Office of the Chief Postal Inspector. A litigant must first obtain authorization of the Counsel, Office of the Chief Postal Inspector, before designating an Inspection Service employee as an expert or opinion witness.

(j) *Postal liability.* This section is intended to provide instructions to Inspection Service employees and does not create any right or benefit, substantive or procedural, enforceable by any party against the Postal Service.

(k) *Fees.* (1) Unless determined by 28 U.S.C. 1821 or other applicable statute, the costs of providing testimony, including transcripts, shall be borne by the requesting party.

(2) Unless limited by statute, such costs shall also include reimbursement to the Postal Service for the usual and ordinary expenses attendant upon the employee's absence from his or her official duties in connection with the case or matter, including the employee's salary and applicable overhead charges, and any necessary travel expenses as follows:

(i) The Inspection Service is authorized to charge reasonable fees to parties demanding documents or information. Such fees, calculated to reimburse the Postal Service for the cost of responding to a demand, may include the costs of time expended by Inspection Service employees, including attorneys, to process and respond to the demand; attorney time for reviewing the demand and for legal work in connection with the demand; expenses generated by equipment used to search for, produce, and copy the requested information; travel costs of the employee and the agency attorney, including lodging and per diem where appropriate. Such fees shall be assessed at the rates and in the manner specified in § 265.9.

(ii) At the discretion of the Inspection Service where appropriate, fees and costs may be estimated and collected before testimony is given.

(iii) These provisions do not affect rights and procedures governing public access to official documents pursuant to the Freedom of Information Act, 5 U.S.C. 552a.

(k) *Acceptance of Service.* These rules in no way modify the requirements of the Federal Rules of Civil Procedure (28 U.S.C. Appendix) regarding service of process.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 95-13252 Filed 6-5-95; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[A-1-FRL-5217-1]

Determination of Attainment of Ozone Standard for Lewiston-Auburn and Knox and Lincoln Counties, Maine Ozone Nonattainment Areas and Determination Regarding Applicability of Certain Reasonable Further Progress and Attainment Demonstration Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to determine that the Lewiston-Auburn, Maine and the Knox and Lincoln Counties, Maine ozone nonattainment areas have attained the National Ambient Air Quality Standard (NAAQS) for ozone and that certain reasonable further progress and attainment demonstration requirements, along with certain related requirements, of Part D of Title I of the Clean Air Act are not applicable for so long as the areas continue to attain the ozone standard. In the Final Rules section of this **Federal Register**, EPA is making these determinations without prior proposal. A detailed rationale for the action is set forth in the direct final rule. If no adverse comments are received in response to that direct final rule, no further activity is contemplated in relation to this proposed rule. If EPA receives adverse comments, EPA will withdraw the direct final rule and address the comments in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this notice. Any parties interested in commenting on this notice should do so at this time.

DATES: Comments on this action must be received by July 6, 1995.

ADDRESSES: Written comments should be mailed to Susan Studlien, Director, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region I, JFK Federal Bldg., Boston, MA 02203. Copies of the relevant material for this notice are available for public inspection during normal business hours, by appointment at the Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region I, One Congress Street, 10th floor, Boston, MA and the Bureau of Air Quality Control, Department of Environmental Protection, 71 Hospital Street, Augusta, ME 04333.

FOR FURTHER INFORMATION CONTACT: Richard P. Burkhart, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region I, JFK Federal Bldg., Boston, MA 02203. Phone: 617-565-3244.

SUPPLEMENTARY INFORMATION: For additional information, see the direct final rule published in the Final Rules section of this **Federal Register**.

Dated: May 22, 1995.

John P. DeVillars,

Regional Administrator, Region I.

[FR Doc. 95-13813 Filed 6-5-95; 8:45 am]

BILLING CODE 6560-50-P

40 CFR Part 70

[AD-FRL-5216-8]

Clean Air Act Proposed Interim Approval of Operating Permits Program; Sacramento Metropolitan Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed interim approval.

SUMMARY: The EPA proposes interim approval of the Operating Permits Program submitted by the Sacramento Metropolitan Air Quality Management District ("Sacramento" or "District") for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources.

DATES: Comments on this proposed action must be received in writing by July 6, 1995.

ADDRESSES: Comments should be addressed to Ed Pike at the Region IX address. Copies of the State's submittal and other supporting information used in developing the proposed interim approval are available for inspection